APPEAL BOARD/AGENCY SHOP DEVELOPMENTS -- 2001
PUBLIC EMPLOYMENT RELATIONS COMMISSION
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1999 and 2000 Agency Shop cases
A bad boy disrupts the "Class"

When my age could still be counted on the fingers of both hands, one of my favorite books was "*Penrod,*" Booth Tarkington's early 20th century novel about the "worst boy in town." A private sector agency shop ruling, which bears the name of the anti-hero (and role model) of my youth, has been causing considerable mischief for the NLRB.

Penrod usually performed his most disruptive deeds in school. Most of the public sector agency shop cases digested in this handout involve teaching staff. But the term "class" in these decisions refers to legal procedure, not the place where their lessons are taught.

Class action applications are often part of challenges to public sector agency shop laws and agreements. But, until recently, the applications to group all non-members in a single class have been denied or granted on a limited basis. *See Robinson v. New Jersey*, 741 *F.2d* 598, 603 n.5 (3rd Cir. 1984); *Hohe v. Casey,* 956 *F.2d* 399, 413 (3rd Cir. 1992). Recent public sector and Railway Labor Act cases show a change in that trend. Class action suits may extend relief to public sector and RLA employees who were unaware of challenges to agency shop fees.

Overall, the crop of recent agency shop cases contain few variations on the tenets set by U.S. Supreme Court opinions. *See Abood v. Detroit Bd. of Ed.*, 431 *U.S.* 209 (1977); *Ellis v. Railway Clerks,* 466 *U.S.* 435 (1984); *Chicago Teachers Union v. Hudson*, 475 *U.S.* 292 (1986); *Beck v. CWA*, 487 *U.S.* 735 (1988); *Lehnert v. Ferris Faculty Association*, 500 *U.S.* 507 (1991); *Air Line Pilots Association v. Miller*, 523 *U.S.* 866 (1998); *Marquez v. Screen Actors Guild,* 525 *U.S.* 33 (1998). State and federal courts continue to apply these precedents. Their differing interpretations may provide the grounds for a grant of *certiorari* on issues such as the obligation of a non-member to annually renew an objection, the "local union presumption" and the content of a *Beck* or *Hudson* notice.

Private Sector

***Penrod v. NLRB*, 203 *F.3d* 41 (D.C. Cir. 2000)**

Reversing a Board finding that a Teamsters local did not violate its duty of fair representation to financial core members, the court holds that the NLRB improperly applied *CWA v. Beck* and remands the case. The Board had held that the initial notice sent to potential objectors need not state the percentage of dues spent on non-chargeable activities. The Board had also held that a letter with an attached one-page auditor's handwritten worksheet was sufficient to inform objecting employees about how union dues are used. The Court disagreed, ruling that under *Chicago Teachers Union v. Hudson*, an initial notice must specify the percentage of dues used for chargeable and non-chargeable activities. The appeals court held that the notice given to objectors failed to explain how the union computed the chargeable percentage of dues. Finally, the court held that because the Union also sent dues to affiliates, an explanation of how the affiliates allocated dues revenues was required.

***Thomas v. NLRB*, 213 *F.3d* 651 (D.C. Cir. 2000)**

The court, applying *Penrod*, holds that a nonmember was improperly discharged for nonpayment of dues. The Union's initial *Beck* notice did not state the percentage of dues used for chargeable activities. The nonmember asserted he was entitled to that information in order to decide whether to file an objection. He did not file an objection and was discharged for failing to pay full union dues. The Court overturned the NLRB order upholding the discharge. However, it affirmed the NLRB's dismissal of a second unfair practice complaint involving the calculation of the agency shop fee. It found that the Union was not unreasonable in presuming that it would spend a higher percentage of its dues revenues on chargeable activities than its international affiliate. The Local then set its percentage of chargeable expenses at the same level as that used by the International. This practice, termed a "local union presumption," is often used in agency shop accounting and was accepted by the court. Other cases have not always agreed with its use.

***Abrams v. CWA*, 2000 *U.S. App. Lexis* 7106 (D.C. Cir. 2000)**

Applying *Penrod*, the D.C. Circuit holds that financial core payors who did not file objections after receiving a revised *Beck* notice could not challenge the assessment for any year covered by the corrected notice. *Abrams v. Communications Workers of America*, 59 *F*.3d 1373 (D.C. Cir. 1995) had ordered the corrected *Beck* notices to be issued.

***OPEIU Local 29 (Dameron Hospital) and Stoppenbrink*, 331 *NLRB* No. 15, 164 *LRRM* 1105 (2000)**.

The NLRB holds that the OPEIU violated its duty of fair representation when it refused to process the objection of a former union member unless he specified which expense categories were allegedly inaccurate. The Board states its disagreement with *Penrod*'s holding concerning the specificity of the initial notice to be supplied to potential objectors, observing that it concurred with the court about what information must be given to objectors, but differed about the timing of when that material must be supplied. The NLRB holds that OPEIU's notice did not violate *Penrod*.

Railway Labor Act

***Masiello & Sickler v. U.S. Airways & IAM*, 113 *F. Supp.2d* 870 (W.D. N.C. 2000).**

Summary judgment was granted in favor of nonmember employees in their suit against the airline and the union for terminating them for nonpayment of accrued union dues. Applying *Hudson*, the federal court finds that the union did not provide a meaningful pre-collection notice or an audited financial statement and failed to maintain a proper escrow account. Nor did its agency shop system provide an opportunity for expeditious review of the fee before an impartial decision-maker. The court reserved ruling on a challenge to the indemnification clause and directed the parties to negotiate and mediate the remaining issues.

***Lutz et. al. v. IAM*, 121 *F. Supp.2d* 498 (E.D. N.C. 2000).**

Nonmember employees of United Airlines represented by the IAM challenged both the adequacy of the IAM's *Beck* notice and a rule that an objection be renewed each year. The district court (196 *F.R.D.* 447) had granted certification to a proposed class of 1039 nonmembers, even though no more than 315 filed objections and only 26

challenged the annual objection rule. The court, noting that there is a division among the federal circuits, holds that the annual objection requirement is unduly burdensome and violates nonmembers' First Amendment rights.

Public Sector

***Tavernor v. Illinois Fed'n of Teachers & Univ. Prof'ls Local 4100*, 226 *F.3d* 842 (7th Cir. 2000).**

The Seventh Circuit holds that a literal application of a public sector agency shop law would violate the First Amendment rights of a certified class of state university employees. The court holds that where agency shop fees are paid by public and Railway Labor Act employees, unions may not use fee systems that collect full dues or amounts they know exceed chargeable costs and then require objections to get back excess amounts. Employing a principle of statutory construction used in *Robinson v. New Jersey*, the federal appeals court construes the Illinois Educational Labor Relations Act to require advance reduction for agency shop fees. The court acknowledges that not all circuits have required advance reduction.

***Baird v California Faculty Association*, 2000 *U.S. Dist. Lexis* 13594; 166 *LRRM* 2491 (E.D. Cal. 2000).**

The federal court certifies a proposed class of approximately 14,000 California state university employees who are not members of the unions that represent them. The class action challenges an agency shop law that requires nonmembers to pay either a fare share fee or, in the case of religious objectors, an equivalent amount to a non-religious and non-labor charity. The court distinguishes other agency shop cases denying class representation because the plaintiffs in this case seek declaratory and injunctive relief rather than money damages. The plaintiffs seek a ruling that the agency shop law is facially invalid.

***Prescott et al. v. County of El Dorado*, 177 *F.3d* 1102 (9th Cir. 1999), vacated, rem'd, 528 *U.S.* 1111 (2000), reinstated in part, rem'd 204 *F.3d* 984 (9th Cir. 2000).**

Nonmember County employees asserted that the majority representative's agency shop system was defective. The union collected full dues, escrowing just two percent as the non-chargeable portion of fair share fees. If an objection was filed an additional two percent was escrowed. The appeals court affirmed the district court's

ruling that the fee collection procedures were inadequate. It also held: nonmembers could sue in federal court without exhausting the union's procedures; financial information cannot be based upon a "local union presumption" and must be independently audited; and restitution to objectors should not include amounts which are chargeable (if expenditures are properly verified). In the second court of appeals case, the court allowed the nonmembers to challenge the validity of an indemnification clause in the contract between the union and the public employer and remanded the issue to district court.

***Murray v. Local 2620 D.C. 57, AFSCME,* 192 *F.R.D.* 629 (N.D. Cal. 2000).**

***Friedman v California State Employees Association,* 2000 *U.S. Dist. Lexis* 7049, 163 *LRRM* 2924 (E.D. Cal. 2000).**

In *Murray*, the district court certifies a proposed class of nonmember California state employees in a statewide Health and Social Service Professional bargaining unit. Rejecting the union's arguments that the alleged monetary damages suffered by the nonmembers fall into three different categories, the court holds that the proposed class has allegedly suffered common violations of their rights under *Chicago Teachers Union v. Hudson*. *Friedman* involves similar issues and reaches the same result.

***Evergreen Freedom Foundation v. Washington Education Association,* 140 *Wash 2d.* 615, 999 *P. 2d.* 602 (2000).**

The Supreme Court of Washington holds that state and local affiliates of the National Education Association do not come within the definition of "political committee" in the "Fair Campaign Practices" law. That statute requires employees to execute an annual written authorization if they wish to have contributions to political candidates deducted from their salary. Agency shop fees collected from non-members were not used for political campaigns.

***Cone v. Nevada Service Employees Union/SEIU Local 1107,* 998 *P. 2d.* 1178, 164 *LRRM* 2202 (NV 2000).**

After 100 members resigned and revoked their union dues authorizations, the union disseminated a new policy to: (1) establish a fee schedule for all nonmembers of the union for representation in grievance matters; and (2) notify nonunion members that they could select outside counsel to represent them in bargaining unit matters. The

policy's fee schedule provided that grievance consultation would cost a minimum of sixty dollars an hour and that the nonunion member was responsible for fifty percent of the billed fee for hearing officers and arbitrators and one hundred percent of union attorney fees of up to two hundred dollars per hour.

A Nevada statute explicitly authorizes a nonunion member to act on his own behalf "with respect to any condition of his employment." The Nevada Supreme Court construes the law as providing an individual with a right to forego union representation and with the implicit obligation to pay for pursuing his or her own grievance, even if such payment is made to the union. The court affirms the ruling of the Local Government Employee-Management Relations Board which held the union's action was not an unfair labor practice. It also holds that the decision does not conflict with the state's "right to work" laws.

***Wareham Educ. Ass'n v. Mass. Labor Rels. Comm'n,* 430 *Mass*. 81 (1999), *cert.* den. 528 *U.S.* 1062 (1999).**

The Massachusetts court rejects the Association's proposed reliance on a "local union presumption" to avoid the cost of auditing the expenditures of small affiliates of the NEA and its Massachusetts affiliate. The court sustains the order to refund fees absent an audit.

***Belhumeur v. Mass. Labor Rels. Comm'n,* 432 *Mass*. 458 (2000), *cert.* den. ___ *U.S.* ____, 121 *S. Ct.* 1227 (2001)**.

A long dispute nears its end with the Court's review of a ruling on a variety of *Hudson* and *Lehnert* issues. The charges were first filed with the MLRC in 1989. The opinion finds that given the extensive litigation, review of the fee was reasonably prompt. The court holds that the formula used to calculate it did not violate objectors' free speech rights by requiring support of nonchargeable activities. Held chargeable are costs to maintain the union's existence and informational services, including an article about communication points during a strike. But, expenses of a prohibited strike were not chargeable, nor was advocacy of public education funding, which was deemed to be political speech.